

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

JOSHUA PETTIS,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR JEFFERSON COUNTY

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

**1. Because Mr. Pettis did not expressly agree to pay restitution for the uncharged crime the trial acted without authority when it imposed restitution.**

The State charged Joshua Pettis with first degree theft after it alleged he stole parts of a steel bridge. CP 1-4; RP 71. Because both parties agreed the primary concern was getting Mr. Pettis into substance abuse treatment, the State dismissed the theft charge and permitted Mr. Pettis to enter a guilty plea to possession of methamphetamine instead. RP 10-11. The State recommended a sentence of 12 months community custody with treatment. CP 10. As part of its recommendation, it requested legal costs and \$188,000 in restitution. Id.

Restitution is permitted only for losses that are causally connected to the crime charged under RCW 9.94A.753(5). State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). The only exception to this rule is when the defendant “expressly agrees to pay restitution for crimes for which [he] was not convicted.” Id. at 966 (emphasis added). It is undisputed that there was no causal connection between the crime charged and the restitution imposed against Mr. Pettis. Resp. Br. at 7-9. In its response, the State argues the restitution

order is valid because “Mr. Pettis expressly agreed to pay restitution to the U.S. Forest Service as part of a plea agreement that he signed.” Resp. Br. at 8. In support of this claim, it cites to the prosecutor’s recommendation of restitution. Id.; CP 10. It claims that because the court found “Mr. Pettis ‘knowingly, intelligently, and voluntarily’ agreed to the plea bargain,” the court had the authority to order restitution. Resp. Br. at 9.

The State’s argument is without merit. The court did not find Mr. Pettis “agreed to the plea bargain.” In the portion of the record the State cites, the trial court found Mr. Pettis’s “plea” was knowingly, intelligently, and voluntarily made and that he understood the consequences of it. RP 17. As part of that plea, Mr. Pettis understood the State would recommend restitution, but he did not expressly agree to pay restitution. CP 10. In fact, the plea statement with which Mr. Pettis agreed specifically stated, in section 7(h), that the judge did not have to follow the prosecutor’s recommendation as to sentence.

The State cannot rely on the fact Mr. Pettis knew the State would recommend restitution to show that he expressly agreed to pay restitution. See Griffith, 164 Wn.2d at 966; State v. Dauenhauer, 103 Wn. App. 373, 378, 12 P.3d 661 (2000). As discussed in the opening

brief, the trial court seemed to recognize it had received no express agreement from Mr. Pettis when it stated at sentencing that he had “apparently agreed” to restitution as part of his guilty plea. RP 19. The authority of the trial court is derived entirely from statute and an order imposing restitution is void if the statutory provisions are not followed. State v. Duback, 77 Wn. App. 330, 332, 891 P.2d 40 (1995); Dauenhauer, 103 Wn. App. at 378. Because Mr. Pettis did not expressly agree to the State’s recommendation, the order imposing restitution is void and must be reversed and dismissed. Duback, 77 Wn. App. at 332-33.

**2. Mr. Pettis was denied the effective assistance of counsel when he failed to challenge the trial court’s authority to impose restitution.**

Mr. Pettis had the constitutional right to effective assistance of counsel. U.S. Const. amend. VI; Const. art. I, § 22; United States v. Cronin, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). The State argues simply that Mr. Pettis was not denied this right because the trial court had authority to order restitution under RCW 9.94A.753(5). Because the court did not have this authority, as explained above and in the opening brief, Mr. Pettis was denied the effective assistance of

counsel and reversal is required to give Mr. Pettis the opportunity to contest the imposition of restitution at a new hearing. See Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

**3. The restitution order must be vacated because it was based on speculation and conjecture.**

Evidence presented at a restitution hearing is only sufficient if it provides the trier of fact with a reasonable basis for estimating the loss and requires no speculation or conjecture. State v. Deskins, 180 Wn.2d 68, 82-83, 322 P.3d 780 (2014). The State argues that the actual loss suffered by the United States Forest Service was “neither speculative nor conjectural” because it was determined by the original fabricator of the bridge. Resp. Br. at 12.

It is true that the figure provided, \$188,000, was calculated by the original fabricator of the bridge based on information provided by a Forest Service engineer, who performed an inventory of the missing bridge components. RP 44, 122, 132; CP 27-28. However, as explained in the opening brief, this estimate only provided a lump sum. CP 27. An attached computation sheet listed parts to be replaced, but not did not provide the cost of the individual parts, and the sales

manager from the original fabricator was unable to provide even a “ballpark” figure for the cost of any individual components. RP 55; CP 28.

The trial court held Mr. Pettis was not responsible for the entire loss and the evidence presented by the State did not provide the court with the information needed to determine what portion of the \$188,000 was properly attributed to Mr. Pettis’s actions. RP 187. Instead, the court was required to perform its own calculations and, as explained in the opening brief, the resulting estimate was not supported by the evidence at trial. Op. Br. at 17-21.

The State’s only response to this argument is comprised of one sentence in its brief: “[t]he court then conducted a reasoned analysis of the testimony from Deputy Allen, Mr. Pettis, Mr. Myers, and Mr. Enriguez [sic] to determine the amount of damage to be borne by Mr. Pettis.” Resp. Br. at 12. As explained in the opening brief, the evidence provided by these witnesses required the court to rely on speculation and conjecture. Op. Br. at 17-21. The State’s bald assertion to the contrary, without any analysis, is without merit.

The trial court’s order imposing restitution must be vacated and the case remanded for a new hearing. In its response, the State does not



dispute that if a new restitution hearing is ordered, no new evidence may be admitted. Griffith, 164 Wn.2d at 967 n.6.

B. CONCLUSION

For the reasons stated above and in his opening brief, Mr. Pettis respectfully requests this Court reverse the restitution order and remand for dismissal, or in the alternative, vacate the order and remand for a new hearing.

DATED this 29<sup>th</sup> day of August, 2014.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Kathleen A. Shea", written over a horizontal line.

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Washington Appellate Project (91052)  
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DIVISION TWO**


STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 45533-1-II
v.	)	
	)	
JOSHUA PETTIS,	)	
	)	
Appellant.	)	

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# WASHINGTON APPELLATE PROJECT

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# WASHINGTON APPELLATE PROJECT

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